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IN THE

Supreme Court of the United States

October Term, 1943.

No. 337.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Respondent.

Petition of Respondent Stockholders Publishing Company, Inc. for Rehearing.

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SUBJECT INDEX.

	PAGE
Grounds for rehearing	1
Ground 1	2
Ground 2	2
Ground 3	3
Ground 4	4

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Champlin Rfg. Co. v. Commission, 286 U. S. 210	4
Shields v. Idaho-Utah Railroad Company, 305 U. S. 117	5
Small Co. v. Am. Sugar Rfg. Co., 267 U. S. 239	4
United States v. Rock Royal Cooperative, Inc., 307 U. S. 553	4

STATUTES.

The Railway Labor Act, 45 U. S. C. A., Sec. 151	5

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PETITION FOR REHEARING.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now, the Stockholders Publishing Company, Inc., respondent in the above entitled cause, and presents this, its Petition for Rehearing of such cause and in support thereof respectfully shows:

Grounds for Rehearing.

1. There is a division of opinion among the Justices.

2. The Court has apparently misunderstood or misapprehended the argument of this respondent respecting the value of State Court decisions in interpreting the Wagner Act.

3. Though departing in its decision from the well established concept of the word "employee," the Court has failed to suggest a definite test for the determination of the employer-employee relationship, and its pronouncements tend to further confuse rather than clarify this most important problem.

4. By its broad pronouncements in the decision, the Court has in effect abrogated the effectual right of appeal from an order by an administrative body.

Ground 1

Mr. Justice Roberts in his dissenting opinion, in commenting upon the intent of Congress in defining the word "employee," stated in effect that it was clear that Congress intended that the provisions of the Act were, as respondent contends, intended to extend only "to those who, as a result of decades of tradition which had become part of the common understanding of our people, bear the named relationship."[1]

It is respectfully urged that this is a doctrine from which the Court should not depart.

Ground 2

It appears to be assumed in the Opinion[2] that this or all respondents have advanced the suggestion or argued that State laws should be a controlling factor in determining the employer-employee relationship.

This respondent respectfully submits that it advanced no such contention in its brief on file herein or in its argu-

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[1]Opinion, page 18.

[2]Opinion, pages 8 and 9.

ment. Under the title, in respondent's brief "There is no Substantial Evidence Showing Control by Respondent Over the Newsboys," it is true respondent referred to a few leading State cases upon the theory that they might merely be of aid in determining the legal, conventional and common law meaning of the word "employee."

In its brief under the title "The Term 'Employee' as Used in this Act Should be Given its Legal and Conventional Meaning," no State Court authorities were cited; nor were any State authorities cited in support of the proposition (Point 1(e), Respondent's Brief, page 38) that the determination of the meaning of the word "employee" was a legal question and a function of the Court and not of an administrative body—on the contrary all cited cases were federal authorities.

It is therefore respectfully submitted that it would appear from pages 8 and 9 of the Opinion, that this Court misapprehended respondent's argument in this respect.

Ground 3

It is respectfully pointed out that no satisfactory solution is offered to the question posed by the Opinion.[3]

In further discussing the question quoted in the footnote, the Court states[4] as follows:

> "Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this

[3]Opinion, page 10. "The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprises and not employment."

[4]Opinion, page 11.

Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

It is respectfully and earnestly urged that no certain or reasonably certain guide is thereby provided for the future determination of the relationship of employer and employee if we are to depart from the well established meaning of the word "employee" as developed by long-time usage, custom and common law.

A test which is indefinite or uncertain actually amounts to no test at all.[5]

Ground 4

Respondent has earnestly contended and respectfully continues to earnestly contend, that the question as to who is or is not an employee under the Act is a question of interpretation of the Act and is, therefore, a judi-

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[5] *Champlin Rfg. Co. v. Commission*, 286 U. S. 210, at 243:

"It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

Citing various cases, including:

Small Co. v. Am. Sugar Rfg. Co., 267 U. S. at 239-241;
U. S. v. Rock Royal Cooperative, Inc., 307 U. S. 553. Opinion by Mr. Justice Reed.

cial and not an administrative function. Ergo, that such function should not be circumscribed by the findings of the Board or administrative body. Only when the language of the Congressional Act expressly delegates the determination of a question to an administrative body should the findings of such body be final.[6]

While the Court in its Opinion adopts a contrary view expressed in the following language (Opinion, pp. 14, 15):

> "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record."

it is most respectfully submitted that the language just quoted if applied literally will result practically in abrogating the effectual right of appeal. This for the reason that it is quite unlikely that a record coming before this Court on appeal from an administrative body would ever fail to support *to some extent at least* the findings of such administrative body. Hence an appeal might become a mere gesture.

It is respectfully submitted that the findings of an administrative body should be supported by substantial and persuasive evidence and that such findings should not be final merely because they have "support in the record."

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[6] *Shields v. Idaho Utah Railroad Company*, 305 U. S. 117.
The Railway Labor Act, 45 U. S. C. A., Sec. 151, contains such expressed delegation of authority which was the controlling factor in the *Shields* case.

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of this Honorable Court upon further consideration be reversed.

Respectfully submitted,

L. B. BINFORD,

Attorney for Respondent, Stockholders Publishing Company, Inc.

Certificate of Counsel.

I, counsel for Petitioners, certify that the foregoing petition is presented in good faith and not for the purpose of delay and in our opinion is well taken.

L. B. BINFORD.